

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	WT Docket No. 97-82
Request for Extension)	
Of the Commission's)	
Initial Non-Delinquency Period for)	
C and F Block Installment Payments)	

MEMORANDUM OPINION AND ORDER

Adopted: March 25, 1999

Released: April 2, 1999

By the Commission: Commissioners Furchtgott-Roth and Tristani dissenting and
issuing a joint statement.

1. We have before us petitions for reconsideration ("Petitions") filed by SouthEast Telephone, Inc. ("SouthEast") and Wireless Ventures, Inc. ("Wireless Ventures") (collectively "Petitioners"). They seek review of the Commission's order, released October 29, 1998, denying requests for waiver of the October 29, 1998, deadline for late resumption of installment payments filed by several broadband PCS C and F block licensees, including Petitioners.¹ Additionally, SouthEast filed an Emergency Request for Stay ("Emergency Request") of the *October 29th Order*² and a Request for Stay of the auction of the licenses

¹ See In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, FCC 98-290 (released October 29, 1998) ("*October 29th Order*"). On November 30, 1998, Wireless Ventures submitted a filing styled an application for review of a Bureau order, rather than a petition for reconsideration of the Commission's *October 29th Order*, as procedure mandates. For the purpose of this order, we will treat Wireless Ventures' Application for Review as a petition for reconsideration.

² SouthEast filed both its Petition and Emergency Request on November 4, 1998. SouthEast also submitted a Supplement to Petition for Reconsideration on November 30, 1998, a Second Supplement to Petition for Reconsideration on December 4, 1998 ("Second Supplement"), and a Third Supplement to Petition for

formerly held by SouthEast.³ On November 20, 1998, by Public Notice, we requested comment on SouthEast's Petition.⁴ We received two comments in support of the Petition.⁵ For the reasons stated below, we deny the Petitions and SouthEast's Emergency Request.

2. Petitions. SouthEast contends that the Commission did not address the specific facts and circumstances that supported SouthEast's request for waiver under the "hard look" standard set forth in *WAIT Radio v. FCC*.⁶ Commenters AirNet and DiGiPH support this argument.⁷ Wireless Ventures argues that the Commission erred in holding that the public interest would not be harmed by denying its request for waiver.⁸

3. We disagree with Petitioners' contentions. At the outset, we note that the court in *WAIT* stated that because the "very essence of waiver is the assumed validity of the general rule; . . . an applicant for waiver faces a high hurdle even at the starting gate."⁹ The Commission has repeatedly given a hard look to the facts supporting these requests for waiver. Indeed, before issuing the *October 29th Order*, the Commission looked carefully at the facts of each individual waiver request, including SouthEast's,¹⁰ as well as additional facts submitted by SouthEast.¹¹ SouthEast has not provided any new facts to convince us that our

Reconsideration on February 25, 1999 ("Third Supplement"). Pursuant to Section 1.106(f) of the Commission's rules, SouthEast's Second Supplement and Third Supplement are untimely. Nevertheless, we will address the issues they raise.

³ SouthEast filed a Request for Stay Or, In the Alternative, For Withdrawal of Markets From Relicensing Process on March 11, 1999 ("Request for Stay").

⁴ "Wireless Telecommunications Bureau Seeks Comment of Petition for Reconsideration," *Public Notice*, DA 98-2343 (released November 20, 1998).

⁵ See Comments of AirNet Communications Corporation ("AirNet"), filed November 30, 1998, and Comments of DiGiPh PCS, Inc. ("DiGiPh"), filed November 30, 1998.

⁶ 418 F.2d 1153 (D.C. Cir. 1969) ("*WAIT*").

⁷ Comments of DiGiPH at 2; Comments of AirNet at 2.

⁸ See Wireless Ventures' Petition for Reconsideration at 3.

⁹ 418 F.2d at 1157. See *BellSouth Corporation and BellSouth Wireless, Inc. v. FCC*, No. 97-1630 (D.C. Cir. January 8, 1999) (upholding Commission denial of a waiver request).

¹⁰ See Emergency Request for Temporary Waiver or Suspension of the Automatic Cancellation Provision of Section 1.2110(f)(4)(iii) of the Commission's Rules, dated October 26, 1998.

¹¹ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, from Jay N. Lazrus, Myers Keller Communications Law Group, dated October 28, 1998.

previous decision was wrong.

4. The Commission's decision in the *October 29th Order* was clearly contemplated by the *C Block Second Report and Order*, the *C Block Order on Reconsideration of the Second Report and Order* and the *Election and Payment Date Order*, in which the Commission carefully considered all aspects of the installment payment issues raised by Petitioners and provided restructuring options and a lengthy suspension of installment payments.¹² In the *C Block Second Report and Order*, the Commission informed the public that it was unlikely to grant waivers of the payment resumption deadlines in light of public interest considerations, particularly as the Commission had already afforded licensees a significant period to raise capital during the time that installment payments were suspended.¹³ We observed in the *October 29th Order* that "[i]n formulating, as well as reconsidering, the restructuring options, the Commission addressed the challenges of raising capital."¹⁴ Acknowledging that access to capital remains an important issue for most C block licensees, including Petitioners, the Commission nonetheless concluded that "a further extension of the non-delinquency period would only serve to undermine the Commission's enforcement of its payment deadlines."¹⁵ Petitioners' requests for waiver were denied not because the Commission failed to give them the hard look they warranted, but rather because the Commission does not agree with Petitioners that further extension of the payment deadline would serve the public interest.

5. Furthermore, we disagree with SouthEast's argument that the Commission's payment rules are unclear and do not necessarily result in the automatic cancellation of licenses for a late installment payment.¹⁶ At the time that SouthEast purchased its licenses, the payment rules provided that a license would cancel following the expiration of any grace period without the successful resumption of payment or upon default with no grace period.¹⁷ The *C Block Order on Reconsideration of the Second Report and Order* amended the rules to

¹² See Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Second Report and Order*, FCC 97-342, 12 FCC Rcd 16436 (1997) ("*C Block Second Report and Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order*, FCC 98-28 (released February 24, 1998) at ¶ 2 ("*Election and Payment Date Order*"); Amendment of the Commission's Rules Regarding Installment Payment Financing for Personal Communications Services (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345 (1998) ("*C Block Order on Reconsideration of the Second Report and Order*").

¹³ 12 FCC Rcd at 16541.

¹⁴ *October 29th Order* at ¶ 4.

¹⁵ *October 29th Order* at ¶ 5.

¹⁶ SouthEast Petition at ¶ 13.

¹⁷ 47 C.F.R. § 1.2110(e)(4)(iii) (1996).

provide that a payment made "more than ninety (90) days" after the resumption payment due date would be deemed a default on the part of the C or F block licensee.¹⁸ In a Public Notice, released April 17, 1998, the Wireless Telecommunications Bureau ("Bureau") stated that licensees that failed to meet the July 31, 1998, payment resumption deadline could submit their payment on or before October 29, 1998, without being considered delinquent, if they timely pay a five percent late payment fee.¹⁹ Most recently, the Bureau reiterated this policy in a Public Notice, dated September 18, 1998, in which it stated that licensees that miss the late payment deadline shall be in default and their licenses shall automatically cancel.²⁰ Contrary to its contentions, SouthEast was well aware that its licenses would cancel automatically if it failed to make full payment of amounts due on October 29, 1998, and cannot claim that the rules do not operate as a matter of law to effectuate automatic cancellation.

6. In denying Petitioners' requests, we reject SouthEast's argument that grant of its waiver request would be consistent with the TE-MCG decision,²¹ in which the Bureau granted Specialized Mobile Radio (SMR) licensee TE-MCG's request for waiver of 47 C.F.R. § 90.812, which governs installment payments for 900 MHz SMR licensees.²² In that case, as a result of an administrative oversight, the Bureau accepted late payment of several installments and timely payment of subsequent installments from TE-MCG, constructively waiving the deadlines for the late regularly scheduled payments. In contrast, after clearly stating its intention not to extend the October 29, 1998 late payment deadline, the Commission expressly refused to grant Petitioners' waiver requests. Thus, unlike the TE-MCG case, the Commission has committed no act that could reasonably be construed as constructively waiving the applicable October 29, 1998, late payment deadline, obviating the need to grant a waiver in this instance. Therefore, we declined to grant SouthEast's waiver on the merits of its case, and the TE-MCG decision is inapposite.

7. Lastly, SouthEast contends that application of the Commission's rules on late installment payments and resumption payments²³ to SouthEast is retroactive rule making

¹⁸ *C Block Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd at 8354.

¹⁹ See "Wireless Telecommunications Bureau Announces June 8, 1998 Election Date for Broadband PCS C Block Licensees," *Public Notice*, DA 98-741 (released April 17, 1998). See also 47 C.F.R. § 1.2110(f)(4)(iii).

²⁰ See *Public Notice*, DA 98-1897 (released September 18, 1998).

²¹ See Third Supplement.

²² See Letter to Lloyd W. Coward, Esq., from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, DA 99-258 (released January 29, 1999).

²³ 47 C.F.R. §§ 1.2110(f)(4)(iii) and 1.2110(f)(4)(iv) (1998).

prohibited by the Administrative Procedure Act.²⁴ More specifically, SouthEast claims that the Commission's elimination of the provisions for grace period requests under former Section 1.2110(e)²⁵ impaired SouthEast's rights with respect to its previously established installment payment obligations. AirNet supports this contention.²⁶ In effect, SouthEast is requesting reconsideration of the *Part 1 Third Report and Order*, which was the Order in which the Commission eliminated the grace period provisions. This request is untimely.²⁷ Nevertheless, timely filed petitions for reconsideration of the *Part 1 Third Report and Order* raising this issue are pending before the Commission.²⁸

8. Requests for Stay. SouthEast bases its Emergency Request and its Request for Stay on the four prong test for issuance of a stay set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*,²⁹ as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*³⁰ Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay. Upon examination of the Emergency Request and the Request for Stay, we find that SouthEast's arguments fail to meet the standards set forth in *Virginia Petroleum* and *Washington Metropolitan*.³¹ SouthEast bases its contention that it meets the standards for

²⁴ SouthEast Petition at ¶¶ 14-21; see 5 U.S.C. §§ 551 *et seq.*

²⁵ 47 C.F.R. § 1.2110(e)(4) (1997). See Amendment of Part 1 of the Commission's Rules -- Competitive Bidding, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 436-42, ¶¶106-113 ("*Part 1 Third Report and Order*").

²⁶ Comments of AirNet at 3.

²⁷ See 47 C.F.R. § 1.429(d).

²⁸ See 63 Fed. Reg. 9793 (1998).

²⁹ 259 F.2d 921 (D.C.Cir. 1958) ("*Virginia Petroleum*").

³⁰ 559 F.2d 841 (D.C. Cir. 1977) ("*Washington Metropolitan*").

³¹ On October 28, 1998, SouthEast filed an Emergency Petition for Stay of the payment resumption deadline in the U.S. Court of Appeals for the D.C. Circuit. The court denied the request on October 28, 1998. See *SouthEast Telephone, Inc. v. FCC*, No. 98-1491 (D.C. Cir. October 28, 1998). On October 29, 1998, SouthEast filed an *ex parte* request for a temporary restraining order ("TRO") in the U.S. District Court for the Eastern District of Kentucky, which the court granted, but rescinded on November 5, 1998. See *SouthEast Telephone, Inc. v. FCC*, No 98-465, Order dissolving TRO (E.D. Ky. Nov. 5, 1998). Subsequently, SouthEast filed an Emergency Petition to Stay Under the all Writs Act of the payment resumption deadline in the U.S. Court of Appeals for the D.C. Circuit, which the court denied on December 4, 1998. See *SouthEast Telephone, Inc. v. FCC*, No. 98-1555 (D.C. Cir. December 4, 1998). We note that SouthEast filed as its Second Supplement, copies of submissions made in connection with this last case in the D.C. Circuit.

issuance of a stay on the expectation that the Commission will grant its Petition. As discussed above, this is not the case. Therefore, SouthEast does not meet the test.

9. Accordingly, IT IS ORDERED that, pursuant to the authority granted in Section 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), and 309(j), the petitions for reconsideration submitted by SouthEast and Wireless Ventures ARE DENIED as provided herein.

10. IT IS FURTHER ORDERED that SouthEast's Emergency Request IS DENIED.

11. IT IS FURTHER ORDERED that SouthEast's Request for Stay IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

Dissenting Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani

In the Matter of Request for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Payments

In today's action, the Commission fails to reconsider adequately an earlier decision which has the effect of cutting off communications service to underserved areas of rural Kentucky. For the reasons set forth below, we respectfully dissent from this decision.

In a 3-2 decision October 29, 1998, the Commission denied the request of C-Block licensee SouthEast Telephone, Inc., ("SouthEast") to grant a limited waiver of the deadline for resumption of installment payments. We dissented from the October 29th decision because we believed that the SouthEast situation met the criteria for waiver and that, at the very least, SouthEast's request warranted "a hard look and due consideration of the specific facts presented in the pleadings."

In its decision denying SouthEast's Petition for Reconsideration, the majority argues that denial of the waiver request was "clearly contemplated" by the original C-Block order. Although the Commission indicated that it would be reluctant to grant requests for extension, we cannot support the notion that a rule could fully anticipate and obviate all subsequent waiver requests. To do so would render the waiver process meaningless.

Moreover, the majority claims, but does not support the conclusion, that the Commission "looked carefully at the facts" of SouthEast's waiver request, as well as additional facts submitted by SouthEast before the October 29th decision. We expressly disagreed with this assertion in our statement on the October 29th decision, and we continue to dispute the majority's claim that the Commission has given SouthEast the "hard look" required for waiver requests. The lack of analysis -- and even recitation -- of the facts of the case in both decisions belies the majority's assertion.¹ By merely repeating but not supporting its claims in the present decision, the majority disregards the purpose of the reconsideration process.

Finally, the majority states that "SouthEast has not provided any new facts to convince us that our previous decision is wrong." New facts, however, need not be provided by a petitioner, nor found by the Commission, as a prerequisite for the FCC to modify or reverse an earlier decision. Petitions need only "state with particularity the respects in which petitioner believes the action taken by the Commission or the designated authority should be changed [and] where appropriate, cite the findings of fact and/or conclusions of law which petitioner believes to be erroneous" 47 C.F.R. Sect. 1.106(d). Thus, even if we were to agree with the majority's

¹ For a discussion of these facts, see our previous statement. Dissenting Statement of Commissioners Harold Furchtgott-Roth and Gloria Tristani, In the Matter of Requests for Extension of the Commission's Initial Non-Delinquency Period for C and F Block Installment Payments, WT Docket No. 97-82, *Order*, FCC98-290 (released October 29, 1998).

analysis of the new facts presented by SouthEast, we believe the majority has failed to reconsider adequately its October 29th decision.

It is unfortunate that the Commission's zeal to enforce a self-created deadline has hampered its ability to fairly address petitions for waiver and reconsideration and has frustrated its mandate from Congress to provide communications service to the public, including those in underserved rural areas. As for this particular situation, however, it is distressing that this same zeal will cut off communications service to underserved areas of rural Kentucky.

* * * * *